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Supreme Court of the United States,

OCTOBER TERM, 1927.

No. 102.

ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,

v.

GEORGE FLINT, SAMUEL COLLINS AND
LUDWIG T. BRIEHM, ETC.,
Respondents.

BRIEF FOR PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JAMES K. SYMMERS,
JOHN C. CRAWLEY,
for the Petitioner.

The Lawyers Printing Co., 115 Nassau St., New York, N. Y.

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No. 102

ROBINS DRY DOCK & REPAIR COMPANY,
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v.

GEORGE FLINT, SAMUEL COLLINS and LUDWIG T. BREHM, etc.,
Respondents.

BRIEF FOR PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

This is a suit by the respondents, charterers of the steamship "Bjornefjord", to recover damages from the petitioner, Robins Dry Dock & Repair Company, for the charterers' loss of profits through the detention of the steamship as a result of the negligence of the petitioner while engaged in repairing the vessel pursuant to a contract with the shipowners. A decree in favor of the respondents was affirmed by the Circuit Court of Appeals for the Second Circuit [13 Fed. (2d) 3], and this Court granted certiorari [273 U. S. 679].

Statement.

In July, 1917, the petitioner contracted with the owners of the Norwegian steamship "Bjornefjord" to drydock, clean, paint and effect certain repairs upon that vessel at the petitioner's shipyard in Brooklyn (R. 2, 12).

While this work was in progress, the steamer's propeller was found to be cracked, and the owners employed the petitioner to replace it with the steamer's spare propeller (R. 12). In installing the spare propeller, the petitioner's workmen negligently allowed it to fall and break (while the vessel lay in a graving dock), with the result that a new propeller had to be cast (R. 4). On that account the steamer was detained in the petitioner's repair yard for a period of two weeks beyond the time when she would otherwise have been restored to service (R. 4).

After the spare propeller had been broken, the respondents notified the petitioner that the vessel was under time charter to them, and stated that their loss through the steamer's detention was at the rate of $75,000 a month, for which they would hold the petitioner accountable, either directly to the respondents, or through the owners (R. 10 11).

The respondents were not parties to the repair contracts between the shipowners and the petitioner (R. 12, 17). The petitioner had no notice of the respondents' charterparty until after the accident (R. 16).

The charterparty between the respondents and the shipowners had been made in 1913, for a period of five years, the owners retaining possession and command of the ship, manning, victualing and navigating her, and engaging to use her in the charterer's service (R. opposite p. 14). There was no demise of the vessel.

The rate of hire payable by the respondents to the shipowners was about $6,000 a month (R. opposite p. 14). By reason of war conditions, the use of the vessel was worth nearly fourteen times that much when the accident hap-

pened (R. 29), and the respondents had actually subchartered the vessel at a rate of more than $80,000 a month, which was somewhat less than the current rate (R. 30).

It was provided by the respondents' charterparty with the shipowners that the steamer should be drydocked for cleaning and painting at least every six months, the payment of hire to be suspended on such occasions until the ship should be again in an efficient state for service, and it was also provided that the payment of hire should be suspended during any time when the steamer might be out of commission as a result of accident to hull or machinery (R. opposite p. 14, Art. 22, 17).

The vessel had been withdrawn from service, pursuant to the first mentioned provision of the charterparty, when she was placed in the petitioner's custody by the shipowners, and she remained off hire until she had been redelivered by the petitioner to the shipowners and by them replaced in the service of the charterers (R. 30).

The petitioner denied liability to the charterers, on the ground that they had no property in the ship, were not parties or privies to the repair contract, and that their loss of profits was legally remote from the petitioner's negligence.

The petitioner settled the shipowners' claim by paying the owners $3,271.21, which is slightly in excess of the amount the shipowners would have received from the respondents if the vessel had been on hire under the charterparty during the period of detention (R. 18, 30). A release of the shipowners' claim was obtained from the master * (R. 18).

Thereafter the charterers brought a suit *in rem* against the vessel to recover for their lost profits (*The Bjornefjord*, 271 Fed. 682). It was alleged that the shipowners had breached Article 1 of the charterparty, which provided that the shipowners should maintain the vessel in an efficient

* The statement in the answer that the petitioner had no notice of the charterers' claim when settlement was made with the owners, is erroneous and should be disregarded.

state for service (charterparty, opposite p. 14). The District Court dismissed the libel on the ground that the charterers' loss fell within the charterparty exceptions against delays caused by accidents to, or breakdowns of, machinery, in respect of which delays the charterers' remedy was defined by the charterparty as relief from the payment of hire until the ship should be restored to service. That decree was affirmed by the Circuit Court of Appeals for the Second Circuit, on the ground that the charterparty did not specify the time within which the shipowners must restore the vessel to service, and that the shipowners were not liable to the charterers for delays resulting from the negligence of an independent contractor properly selected by the shipowners. *The Bjornefjord*, 271 Fed. 682.

The charterers thereupon brought this suit in admiralty against the petitioner, alleging that the repair contract made by the shipowners with the petitioner was a contract for the charterers' benefit, and claiming damages for the petitioner's breach of its alleged contractual duty to the charterers to perform the repairs in a careful manner (R. 2-3).

Before the case was tried, Judge Mayer, sitting in the Southern District of New York, decided in the case of *The Aquitania*, 270 Fed. 239, that a time charterer had a property interest in the chartered vessel, and could recover damages from a tort feasor for injury to the vessel resulting in a loss to the charterer through the vessel's detention.

Following the *Aquitania* decision, the District Court held in the present case that the respondents had a property interest in the vessel, and that the petitioner was liable to the respondents in tort (R. 19-23). The damages were assessed, on the basis of tort liability, at the difference between the subcharter hire the respondents would have received during the extra period of detention and the charter hire the respondents would have paid the shipowners in the same period (R. 29-30).

The Circuit Court of Appeals, in an opinion written by Judge Mack (Judge Learned Hand concurring), held that the

respondents had no property interest in the vessel, and that there was no direct liability on the part of the petitioner in contract; but after considering that "the result reached involves no injustice" to the petitioner (R. 40), the court affirmed the decree upon grounds that will be mentioned below, page 16 (Opinion, C. C. A., R. 37-43; 13 Fed. (2d) 3).

Summary of the Argument.

Not being parties or privies to the repair contract (Point I, *infra*, p. 6) and having no property in the vessel (Point II, *infra*, p. 6, 7), the respondents have no cause of action against the petitioner for the petitioner's negligence in the performance of its contract with the shipowners.

Neither the petitioner's breach of its contract with the shipowners, nor the petitioner's negligence in injuring the vessel, was a tort as to the respondents. The only effect of the petitioner's negligence on the respondents was to impair the value of their contract with the shipowners as to the future service of the vessel. For that result, in the absence of intent, the petitioner is not liable (Point III, *infra*, p. 7).

The grounds of liability upon which the Circuit Court of Appeals rested its decision are not cognizable by an admiralty court, and are not tenable as a matter of law (Point IV, *infra*, p. 16).

The fact that the shipowners might in other circumstances have suffered the loss that fell upon the charterers does not prevent the latter's damages from being legally remote from the petitioner's act (*infra*, p. 21).

The point here involved was not considered in the cases referred to by the Circuit Court of Appeals (*infra*, p. 24).

The injury to the ship occurred while the vessel lay in a graving dock, and a suit to recover damages for that injury is outside admiralty jurisdiction (Point V, *infra*, p. 27).

POINT I.

The respondents have no cause of action upon the repair contract between the petitioner and the shipowners.

The respondents were not parties to that contract (R. 12), and, as the Circuit Court of Appeals said, inasmuch as respondents "were not and were not intended to be the sole beneficiaries thereof, or indeed in any respect beneficiaries, they did not become privies thereto or entitled to sue for breach thereof, even under the most liberal rules that permit third parties to sue on a contract made for their benefit" (R. 39).

> "Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must at least show that it was intended for his direct benefit."
>
> *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U. S. 220, at 230
>
> *National Bank v. Grand Lodge*, 98 U. S. 123
>
> *Pennsylvania Steel Co. v. Ry. Co.*, 198 Fed. 721, 749

It is clear that the respondents did not make out the cause of action they alleged.

POINT II.

The respondents had no property in the ship.

The Circuit Court of Appeals recognized the fundamental error in Judge Mayer's decision in *The Aquitania* (D. C., 270 Fed. 239, and in the District Court's decision in the present case (R. 19), and expressly held that a time charterer acquires "no property interest, not even possession", in the vessel under a charterparty in the form of the present one (Opinion, Mack, C. J., R. 40).

Indeed, that proposition is so well established that it hardly requires attention.

> "If the charterparty let only *the use* of the vessel, the owner at the same time retaining its command and possession and control over its navigation, the charterer is regarded as a mere contractor for a designated service * * * it is a contract for a special service to be rendered by the owner of the vessel."
>
> *Leary v. United States*, 14 Wall. 607 and cases cited.
>
> *New Orleans Belize Royal Mail etc. Co. v. United States*, 239 U. S. 202, which involved a charterparty substantially like the present one.
>
> *Elliott Steam Tug Co., Ltd. v. The Shipping Controller* (1922) 1 K. B. 127; judgment of Scrutton, *L. J.*, at page 139.
>
> *Federated Coal and Shipping Co., Ltd. v. The King*, (1922) 2 K. B. 42, at p. 46.

The charterers had no proprietary interest in the vessel. *Osaka Shosen Kaisha v. Lumber Co.*, 260 U. S. 490.

POINT III.

The injury to the ship was not a tort as to the respondents.

The instances in which one becomes liable to a stranger for the negligent performance of a contract, were reviewed by this court in *Savings Bank v. Ward*, 100 U. S. 195, and the more recent cases in which the performance of a contract may involve a duty to third persons were catalogued by the New York Court of Appeals in *MacPherson v. Buick Motor Car Co.*, 217 N. Y. 382.

Those cases fall into two categories. (1) The cases involving an article or an instrumentality that is either inherently dangerous, or in dangerous condition, and is on that account

likely to injure the health, or destroy the life or limb, of third persons who would expectably have occasion to use the article in the ordinary way. In such a case the contractor in failing to take care commensurate with the known probabilities of danger to others, is held to have invaded the third person's right of personal security. (Cf. *Kuschbrock* v. *General Electric Co.*, 236 N. Y. 227; *Ketterer* v. *Armour & Co.*, 247 Fed. 921 [C. C. A.]. The cases in which the contractor, engaged in a public calling, has given misinformation upon which he knew a third person intended to rely (*Glanzer* v. *Shepard*, 233 N. Y. 236; as explained in *Courteen Seed Co.* v. *Hong Kong & S. B. Corp.*, 245 N. Y. 377, at 381; *Ant. and I. & S. Co.* v. *Hunt*, 312 Ill. 245; 34 A. L. R. 63, annotated p. 67).

After the decision of this case, the Circuit Court of Appeals for the Second Circuit affirmed its adherence to the general rule in the case of *The Federal No. 2* (214 F. 251; 131 where a shipowner who had been obliged to pay for the maintenance and cure of a seaman incapacitated by the negligence of another, was denied recovery of the loss from the tortfeasor, the court holding that the case was within the ordinary rule that

> "damage suffered by one whose interest in the party or thing injured is contractual, is too remote for recovery unless the wrong is done with intent to affect the contractual relations."

citing its opinion in the instant case, wherein the authorities are cited

> "Whenever a wrong or injury results from the breach of a contract merely, an action for redress, whether in form ex contractu or ex delicto, can be maintained only by a party to the contract. The obligation and duty arising out of a contract are due only to those with whom it is made. If the rule were otherwise and no privity of contract were required to sustain an action for a breach, there would be no limit to the liability which might be incurred by a contracting party. It would

extend so as to give a right of action to all persons, however remote from any connection with the original parties to a contract, or however numerous they might be, who happened to sustain a loss or suffer an injury attributable to a breach of the stipulations into which a contracting party had entered."

Davidson v. *Nichols*, 11 Allen (Mass.) 514, 517.

In *Dale* v. *Grant*, 34 N. J. L. 142, the Dale Corporation, in which the plaintiff owned stock, was the plaintiff's tenant and had contracted to supply the plaintiff with all its manufactured products. The acts of the defendant interfered with machinery of the Corporation, and in consequence the plaintiff suffered a loss under its contract with the Corporation. In holding that the plaintiff could not recover, the Court said (at p. 149):

"Doubtless, if the facts stated in this declaration are true, the plaintiffs, by the misconduct of the defendants, have sustained a loss, and so, generally, do all promisees when their promisors have been illegally obstructed in the performance of their contracts. But the law does not attempt to give full reparation to all parties injured by a wrong committed. If this were so, all parties holding contracts, if such exist, under the plaintiffs who may have been injuriously affected by the conduct of the defendants, would be entitled to a suit. It is only the proximate injury that the law endeavors to compensate; the more remote comes under the head of *damnum absque injuria*. No case touching this question was cited in the briefs of either counsel, and after considerable research, I have found but few authorities pertinent to the subject. In *Anthony* v. *Slaid*, 11 Metc. 290, the facts were these: A, who had agreed with the town for a specified sum to support all the town paupers, brought an action against B for assaulting and beating one of the paupers, whereby he, A, was put to increased expense for the pauper's cure and support. It was held the action could not be maintained, Chief Justice Shaw saying, 'It is not by means of any natural or legal relation between the plaintiff and the party injured that the plaintiff sustains any loss by the act of the defendant,

but by means of the special contract by which he had undertaken to support the town paupers. The damage is too remote and indirect. In the case cited the law affordest a remedy to the pauper for the injury inflicted, but its power did not extend a remove further, so as to embrace an injury sustained by the plaintiff in the suit arising by reason of his contract. The judicial conclusion in *Cunningham* v. *Brown* rests upon similar grounds. A creditor of a deceased person had brought an action against one who had forged a note, which, if true, the dividends to creditors had been diminished, and it was decided the suit would not lie."

In *Milton* v. *Story*, 11 Vermont, 101, the defendant had contracted to support another, who, in consequence of the defendant's breach of contract, became chargeable to the town as a pauper. It was held that the town could not recover from the defendant.

In *Brink* v. *Wabash Railway Co.* 160 Mo. 87, the deceased had contracted with his parents to support them for the remainder of their lives. He was killed by the negligence of the Railroad Company. His parents brought suit against the Railroad Company, to which a demurrer was sustained. The Court said (at p. 94):

"But there is another and still further reason why the plaintiff's petition does not state a cause of action, and that is, the damages claimed are too remote.

"There is no allegation in the petition, nor is it pretended, that plaintiff's son was killed with a wilful intent to injure the plaintiffs, and it is only under such circumstances that plaintiffs would be entitled to recover. In *Gregory* v. *Brooks*, 35 Conn. 437, it was held that when one is injured by the wrongful act of another, and others are indirectly and consequentially injured, but not by reason of any natural or legal relation, the injuries of the latter are too remote to constitute a cause of action, but the rule is different where the injury is done to one with a malicious intent to injure another through a contract relation.

"In *Taylor* vs. *Nerr*, 1 Esp. N. P. 386, it was held that damages resulting to a plaintiff by reason of the defend

ant's having assaulted and beaten an actor, whereby the latter was disabled from fulfilling an engagement with the plaintiff, are too remote."

The principle is ably and thoroughly discussed in the case of *Byrd v. English*, 117 Ga. (1902) 3+, at page 192 *et seq.* That was a case where a party to a contract was injured by reason of the failure of the other party to comply with its terms, such failure being due to the negligent act of a third person by which the performance of the contract was rendered impossible. The court, at page 193, says:

> "There is another view presented by counsel for defendants in error, which, if correct, settles beyond doubt that the court below was right in sustaining the general demurrer to the petition. It will be borne in mind that this is not an action for an injury to the person or property of the plaintiff. It is not claimed that the defendants have violated any contractual duty owed to the plaintiff. Their duty to the public in performing the work in which they were engaged was to do it in such a manner as not to negligently injure the person or property of anyone. According to this petition, the damage done by them was to the property of the Georgia Electric Light Company which was under contract to furnish to the plaintiff electric power, and the resulting damage done to the plaintiff was that it was rendered impossible for that company to comply with its contract. If the plaintiff can recover of these defendants upon this cause of action, then a customer of his, who was injured by the delay occasioned by the stopping of his work, could also recover from them, and one who had been damaged through his delay could in turn hold them liable, and so on without limit to the number of persons who might recover on account of the injury done to the property of the company owning the conduits. To state such a proposition is to demonstrate its absurdity. The plaintiff is suing on account of an alleged tort by reason of which he was deprived of a supply of electric power with which to operate his printing establishment. What was his right to that power supply? Solely the right given him by virtue of his contract with the Georgia Electric Light Company, and with that contract the defendants are not

even remotely connected. If under the terms of his contract, he is precluded from recovering from the electric light company, that is a matter between themselves for which the defendants certainly cannot be held responsible. They are, of course, liable to the company for any wrong that may have been done it, and the damages recoverable on that account might well be held to include any sums which the company was compelled to pay in damages to its customers, but the customers themselves cannot go against the defendants to recover on their own account for the injury done to the company.

* * * * * *

So also in *Connecticut Insurance Co.* v. *New York R. R. Co.*, 25 Conn. 265, it is held that where one person has contract relations with another, an injury done to the latter which affects disastrously those relations, does not constitute a legal injury to the former. From the opinion delivered by Storrs, J., we quote the following very pertinent remarks: "Such are the complications of human affairs, so endless and far reaching the initial promises of man to man in business and in matters of money and property, that death is a death produced by human agency, which does not affect the pecuniary interests of those to whom the deceased was bound by contract. To open the door of legal redress to wrongs received through the mere voluntary and facultative relation of a contractor with the immediate subject of the injury, would be to encourage collusion and extravagant contracts between men by which the death of either, through the intervention or default of others, might be made a source of splendid profit to the other, and would also invite a system of litigation more pestilential than our jurisprudence has yet known." To the same effect see *Lathrop* v. *Stod.* 11 Metc. 250; *Buckingham Ins. Co.* v. *Bouchey*, 39 Maine 253; *Fowler* v. *Atlantic Mutual Ins. Co.*, 6 Cush. 270. It follows from what has been said that the plaintiff's petition did not state a cause of action, and that the general demurrer thereto was properly sustained.

Reversed. Fouchet et al., 117 Ga. at pp. 193-195.

See also *Anderson Rubber Co.* v. *Anderson*, 33 Ga. App. 241.

The English Decisions.

In suits growing out of claims against the Crown for statutory compensation for "direct loss or damage by reason of interference with business" of the claimant, through the government's exercise of war powers, the English Court of Appeal has held that a charterer who has suffered a loss through the government's requisition of the chartered vessel may have a claim for loss resulting from "interference with his business", but it has been recognized in such cases that the charterer could not recover in tort for an injury to the ship resulting in his loss of the vessel's services. It was the opinion of SCRUTTON, *L. J.*, that a charterer was not even entitled to compensation as one whose "business" had been interfered with by the requisition. The learned Judge said, in passing:

> "At common law there is no doubt about the position. In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel. Such a person cannot claim for injury done to his contractual right; see on this point the judgment of Blackburn, *J.*, in *Cattle v. Stockton Waterworks Co.* (1875), L. R. 10 Q. B. 453, where a contractor making a tunnel on K.'s land claimed against a wrong doer to K.'s land, whose wrong made his contract less profitable, and was held not entitled to recover. It is for this reason that underwriters cannot sue directly a wrongdoer against property they have insured, but must proceed in the name of the assured, as explained by Lord Penzance in *Simpson v. Thomson* (1877), 3 App. Cas. 279, 298. It is for this reason also that charterers under a charter not amounting to a demise do not and cannot sue in the Admiralty Court a wrongdoer who has sunk by collision their chartered ship. The same principle was applied by Hamilton, *J.*, in *Remorquage à Hélice (Société Auxiliaire) v. Bennetts* (1911), 1 K. B. 243, to prevent the owner of a tug suing the wrongdoer

who had sunk his tow, whereby he had lost the benefit of his contract of towage. When the Court of Appeal in *The Okehampton* (1913), P. 173, allowed sub-charterers to sue for the loss of their bill of lading freight through a collision by the defendants' wrongdoing, they did so, I think, because it was proved that the sub-charterers, not the owners, had contracted to carry the goods and had received them and had, therefore, a lien for the freight and sufficient possession as bailees to sue for damages to the goods: see *The Winkfield* (1902), P. 42. This is a sufficient reason for the decision, as explained by Hamilton, *L. J.*, at the beginning of his judgment. I do not think the headnote is accurate in speaking of possessory interest in the ship.

"But, secondly, at common law, the shipowner suing a wrongdoer for temporary loss of the ship's services would be entitled at common law to recover the loss of profits during that period as a direct consequence of the wrong. This is explained as regards ships by the judgments of Bowen, *L. J.*, and the House of Lords in *The Argentino*, 13 P. D. 191, 14 App. Cas. 519. It is indeed every-day practice in injury cases, where the plaintiff is given loss of earnings or profits during the time his injury lasts as the direct consequences of the injury. I used the word 'direct' because it is the word preferred after consideration of the alternatives by Lord Sumner in *Weld-Blundell v. Stephens* (1920), A. C. 956, 983. The charterer in collision cases does not recover profits, not because the loss of profits during repairs is not the direct consequence of the wrong, but because the common law rightly or wrongly does not recognize him as able to sue for such an injury to his merely contractual rights."

Elliott Steam Tug Co., Ltd., v. The Shipping Controller (1922), 1 K. B. 127, at 139-140.

The rule is thus stated by Pollock:

"When a binding promise is made, an obligation is created which remains in force until extinguished by the performance or discharge of the contract. Does the duty thus owed to the promisee constitute the object of a kind of real right which a stranger to the contract can infringe and thereby render himself answerable *ex de-*

facto? In other words, does a man's title to the performance of a contract contain an element analogous to ownership or possession? The general principles of law (notwithstanding forms of speech once in use and warranted by considerable authority) seem to call for a negative answer. It would confuse every accustomed boundary between real and personal rights, dominion and obligation, to hold that one who prevents Andrew from performing his contract with Peter becomes *ipso facto* a kind of trespasser against Peter."

(Pollock on Torts (11th Ed.), p. 356.)

In *Simpson* v. *Thomson*, (1877) L. R. 3 App. Cas. 279, Lord Penzance, in discussing and rejecting the principle involved in the argument there made in behalf of the respondents, said (pp. 289-290):

"The principle involved seems to me to be this—that where damage is done by a wrong-doer to a chattel, not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrong-doer, although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself such as by lien or hypothecation." • • •

"But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries done to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner, an actor or singer bound for a term to a manager of a theatre is disabled by the wrongful act of a third person to the serious loss of the manager; can the manager

recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel."

See also:

Cattle v. *Stockton Waterworks Co.*, (1875) L. R. 10 Q. B. 453

Remorquage v. *Bennetts*, (1911) 1 K. B. 243

Earl v. *Lubbock*, (1905) 1 K. B., at 255

POINT IV.

The decision below is not supportable.

There was diversity of opinion below between the two courts and between each court and the respondents as to why the petitioner should be held liable for the respondents' lost profits.

The libel was drawn on the theory that the respondents were the intended beneficiaries of the repair contract made by the shipowners with the petitioner, and were entitled to sue the petitioner for breach of that contract (R. 2). The District Court, without referring to the libel, held that the respondents were entitled to recover in tort because they had a property interest in the ship (R. 19). The Circuit Court of Appeals held that there was no substance in either of those theories (R. 39-40), but that the petitioner was liable as a tortfeasor to the respondents for the following reasons:

1. The full measure of the petitioner's liability for negligent injury to a ship resulting in detention, was the market value of the use of the ship during the period of detention.

2. If the shipowners had seen fit to do so in this instance they might have recovered from the petitioner the full mar

let value of the vessel's use, notwithstanding that their own loss was less.

3. If the shipowners had so recovered the full market value of the vessel's use, they would have held as trustees for the respondents the surplus recovered in excess of the actual pecuniary loss the shipowners had suffered.

4. Therefore, having settled with the shipowners by paying an amount less than the full market value of the vessel's use during the period of detention, the petitioner became liable to the respondents. The Court added:

> "It is unnecessary to determine in the instant case whether the charterer's right to recover for his loss is direct against the wrongdoer, enforcible by a libel independent of that which the shipowner but for the release could have brought for his damages, or whether it is indirectly based upon the equitable obligation of the shipowner to the charterer, in analogy to the bailment and the Winkfield cases [1902] Prob. 42]; for no error is assigned because of the failure to join the shipowner as libellant pursuant to the practice adopted in the Sarastad case [206 Fed. 502]." (R. 41.)

In view of the fact that the libel alleged a breach of contract, and that the answer denied any contract with the respondents, and pleaded a release from the shipowners, it is difficult to understand when or how the petitioner had an opportunity to assign the error the learned court suggests.

But the Circuit Court of Appeals concluded:

> "Even if the right be derivative and equitable in its nature, the settlement made and the release accepted, as it was in this case with full knowledge of libellants' claim, could afford no defense in admiralty, the more so when, as here, neither party intended it to operate as a release of more than the owner's own personal damages." (R. 42.)

The Circuit Court of Appeals thus refrained from deciding that the petitioner's negligence rendered the petitioner directly liable to the respondents. Decision was apparently placed on the ground that in obtaining a release from the shipowners without paying as consideration therefor an amount equal to the full market value of the vessel's use for fourteen days, the petitioner participated in a breach of trust owing from the shipowners to the respondents, and so became liable in admiralty as for a tort.

Aside from the question whether admiralty could entertain a libel that alleged the existence of those facts, the first premise of the decision is not supportable.

The petitioner was not unconditionally liable to the shipowners for the full market value of the vessel's use for fourteen days.

In the first place, although the vessel was actually detained for an extra period of 14 days as a result of the necessity for casting a new propeller, the petitioner, as a contractor, was not unconditionally liable for that result, as a tortfeasor would have been. As a contractor, the petitioner was answerable to the shipowners for the ensuing detention only if such detention was reasonably to be apprehended as a probable result of the petitioner's breaking the propeller, at the time when the petitioner contracted to install it.

Hadley v. *Baxendale*, 29 Eng. L. & Eq. 398.
Howard v. *Stillwell*, 139 U. S. 199.
Weston v. *Boston & M. R. Co.*, 190 Mass. 298.

"The duty to refrain from a tort is a duty which no one can avoid; it is imposed upon him by the law, and no act of his can increase or diminish it. But in entering into a contract he is undertaking a duty which the law does not require of him; its assumption is purely voluntary, and fairness requires that he should be able to understand the extent of the obligation he undertakes. A just rule, therefore, would put upon a person who commits a tort the risk of all proximate consequences of his

wrong, but upon one who breaks a contract such risk as he could have foreseen when he undertook the duty; and this appears to be the conclusion of the law."

Sedgwick on Damages, 9th Ed., Volume 1, Sec. 141.

It has not been shown that either party to the contract by which the petitioner engaged to install the propeller contemplated that breaking the propeller would entail the detention of the ship beyond the expected period of repairs, or at any rate for a period of fourteen days beyond that period.

In the second place, even assuming that the shipowners might have had a cause of action against the petitioner for the entire detention, the petitioner had the right to compromise that claim upon such terms as the shipowners might agree to. This is not a case where the petitioner owed a definite sum of money to a trustee, and in bad faith settled with the trustee for less than the admitted debt. The petitioner, in carrying out a repair contract with the owners, had injured a ship; there is no evidence that at the time the settlement was made the petitioner would have paid one cent more than it did for a compromise settlement with the shipowners, no matter how large the damages that might have been recovered by the shipowners upon suit, or who would have been entitled to share the damages if and when the shipowners might have recovered them.

If, as the Court of Appeals seems to have considered, the petitioner was originally liable only to the shipowners, who were obligated to the charterers to collect and account for the latter's lost profits, it is difficult to see why the shipowners, rather than the petitioner, should not be answerable for the shipowners' so-called breach of duty. The petitioner was not obliged to do more than settle with the shipowners, the only persons with whom the petitioner had contracted, and the only persons who had any property interest in the injured ship, and the petitioner was not obliged to pay for a settlement any more than it actually paid. On settling with the shipowners the petitioner's liability was ended.

The basis upon which liability was imposed by the Circuit Court of Appeals is not cognizable by an admiralty court.

Even assuming that the propositions stated by the Circuit Court of Appeals be correct, and that the shipowners might have demanded and recovered from the petitioner an amount equal to the full market value of the vessel's use during the entire period of detention, and that the petitioner, through its participation in the settlement with the shipowners, rendered itself liable as a tortfeasor to the charterers, it seems clear that such liability to the charterers would not be enforceable in admiralty.

The petitioner owed the charterers no duty growing out of the repair contract, and by the clear weight of authority the petitioner was not answerable to the charterers for negligence resulting in injury to the latter's charterparty with the shipowners. The so-called tort as to the charterers seems to have consisted in the petitioner's obtaining a release from the shipowners without paying the full amount of the damages that the shipowners might possibly have recovered. Taking the petitioner's duty to be exactly what the Circuit Court of Appeals assumed that it was, a breach of that duty would not give rise to a cause of action within the jurisdiction of an admiralty court.

In *The Eclipse*, 135 U. S. 599, it was held that a court of admiralty had no jurisdiction of a suit by a majority of the equitable owners of a vessel to remove the master, who held legal title to a one-half interest in the vessel. The Court added:

> "While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake. *Andrews v. Essex Fire Co.*, 3 Mason, 6, 16; or declare or enforce a trust or an equitable title. *Ward v. Thompson*, 22 How. 330; *The Amelia*, 6 Ben. 475, 12 Fed. Cas. No. 6487. Aff. 1 Fed. Cas. 275; *Kellum v. Emerson*,

2 Curtis 79 [14 Fed. Cas. 7669]; or exercise jurisdiction in matters of account merely * * *." (*The Eclipse*, 135 U. S. 599, at 608.)

In *Kellum* v. *Emerson*, 14 Fed. Cas. 7669, Mr. Justice Curtis said:

> "It is often said that a court of admiralty is a court of equity, acting on maritime affairs. This is true when properly understood. A court of admiralty applies the principles of equity to subjects within its jurisdiction. But that jurisdiction differs very widely from the jurisdiction of courts of chancery; and in my opinion embraces no case, where an equitable title, arising out of a trust, is the basis of the claim, and its subject matter is the proceeds of a sale wrongfully made, in violation of that trust."

Here the Circuit Court of Appeals seems to have recognized something less than an equitable title. Recognition has been given to what is at most a doubtful equitable interest in uncollected damages, and admiralty has been held to have jurisdiction of a suit to recover for an impairment of that interest.

It is submitted that the admiralty does not know such a cause of action. (Cf. *The Chauncey*, 264 Fed. 276, at pp. 284-5.)

The fact that the shipowners might in other circumstances have suffered the charterers' loss, does not prevent the latter's damages from being legally remote.

The Circuit Court of Appeals was moved by the consideration that the shipowners' loss through the detention of the vessel was much less than it would have been if the vessel had not been under charter for a relatively low rate of hire. The court therefore attempted to state the case, not in terms of the petitioner's duty to the charterers to refrain from negligently injuring the ship (there was no such duty), but in terms of the petitioner's so-called liability to pay full damages to

the shipowners. If rights and duties can be inverted in that fashion, liability for negligence becomes endless.

In almost every case in which a person or thing is injured, it is conceivable that the aggregate losses resulting from the injury, including the losses suffered by third persons in their contract relationships, might in other circumstances have fallen upon the person most immediately concerned.

For example, it might have been said in *The Federal No. 2* (21 F. (2d) 314) that the injured seaman's full damages would have included his hospital bill had it not been for the contract by which the unsuccessful libelant in that case was obliged to pay his hospital bill. In *Dale v. Grant*, 34 N. J. L. 142, the Dale Corporation, in the absence of its contract with the plaintiff, might have suffered and recovered for the loss that fell on the plaintiff. In *Milton v. Storey*, 11 Vermont 101, the pauper, had he been able to support himself, could have recovered from the defendant as a part of his own damages an amount equal to the plaintiff's loss. In *Taylor v. Neer*, 1 Esp. N. P. 386, the actor might have been his own manager, and recovered an amount equal to the manager's loss, as well as the damages he actually suffered. In *Cattle v. Stockton Waterworks*, 10 Q. B. D. 453, the landowner might have been digging the tunnel himself, and in that event the amount of loss suffered by the plaintiff would have been added to the landowner's damages.

Such instances might be multiplied. They suggest the futility of attempting to discard our present conception of legal liability in favor of a practice by which liability is made to depend upon the possibility that the loss in question might have been suffered by the person legally entitled to sue.

Where, according to this new conception of torts, would the petitioner's liability end? The petitioner has settled with the shipowners; the respondents insist that they must be settled with, too. How about the subcharterer who had contracted with the respondents for the use of the vessel for less than the market rate of hire at the time the accident happened, and who lost the difference between the hire they

would have paid the respondents and the hire they could have got from a second subcharterer? (R. 29). Is the petitioner liable also to the subcharterer and to the sub-subcharterer, and to shippers who had contracted with the latter for space on the vessel at a freight rate lower than the one they were subsequently obliged to pay? There would be no end to litigation if such were the case.

The law as laid down in *Winterbottom* v. *Wright*, 10 M. & W. 109, is stated in *Earl* v. *Lubbock*, 1 K. B. (1905), at page 255, as having settled the English law. Collins, M. R., says:

> "It would, in my opinion, be a waste of time to go through the numerous cases that have been cited, for the principles laid down by Lord Abinger, C. B., in the case that I have mentioned appear to me to be based upon sound reasoning, and to be conclusive in this case. The view taken by the Court is thus expressed by the Chief Baron at p. 114 of the report: 'Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. Where a party becomes responsible to the public, by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent. So, in cases of public nuisances, whether the act was done by the party as a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. Those, however, are cases where the real ground of the liability is the public duty, or the commission of a public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained under the contract. Thus, a carrier may be sued in assumpsit or case, but there is no instance in which a party who was not privy to the contract entered into with him can maintain any such action. The plaintiff in this case could not have brought an action on the contract; if he could have done so, what would have been his situation, supposing the Postmaster-General had re-

> leased the defendant." That would, at all events, have defeated his claim altogether. By permitting this action we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him. It seems to me that the principle there laid down is conclusive in the present case."

The decision of the Circuit Court of Appeals does not give proper consideration to the fact that the respondents had an opportunity to protect their profits either by making themselves parties to the repair contract, or by stipulating with the shipowners that the ship, when off hire to permit repairs, should be restored to service within a specified time. If either of those things had been done by the respondents, the court would not be urged to go beyond accepted principles of law to give the respondents a recovery. The so-called "hard case" that makes bad law would not be presented.

The Circuit Court of Appeals referred to the following cases as instances in which a charterer has recovered damages for injury to the chartered vessel:

The Beaver (C. C. A. 9th), 219 Fed. 139, where a charterer was allowed to recover for loss of *bill of lading freight* as well as for the value of certain personal property belonging to the charterer, lost as a result of the collision. It is respectfully pointed out that the Circuit Court of Appeals in the opinion below, fell into the same error that Judge Mayer had fallen into when he referred to the case in his opinion in *The Aquitania*, 270 Fed. 239. In the *Beaver* case the right of the charterer to recover damages for injury to the vessel was not involved. For all that appears in the reported opinion, and in the abstract of the record appended to Judge Mayer's opinion in *The Aquitania* (270 Fed., at

p. 245), the charterer in the *Beaver* case was the bailee of the cargo, and had a lien upon the cargo for freight. The charterer, as bailee of the cargo, was therefore entitled to recover the lost freight. There is no novelty in that result; it is entirely consistent with the proposition that a charterer not having possession cannot recover damages for injury to the chartered ship.

> "When a vessel is totally lost in the process of earning freight under a charter party, and in consequence the freight also which such vessel in all human probability would have earned, the owner is entitled to recover the amount of this freight. A charterer, or sub-charterer, however, who has for the time being the use of a ship not demised to him cannot recover for the loss of freight. His contractual relation with the owner or previous charterer gives him no such right against the wrongdoer. The owner recovers the value of his ship and the loss of freight under a charter, if the freight has not been paid. But the position of the charterer is different, he is governed by the leading case of *Simpson v. Thompson*, [(1877) L. R. 3 App. Cas. 279; *Societe Romanaise v. Bennetts*, (1911) 1 K. B. 243] which lays down the general rule that one who by contract with the owner of a chattel which is injured has secured advantages which are rendered less beneficial by the damage done has not thereby a right of action against the wrongdoer. *If, however, the charterer or sub-charterer has a right to freight under a bill of lading, signed by himself as principal, and on the facts in regard to such bill of lading is a bailee of the goods, he has thereby such a possession and interest in them as gives him a right to recover from the wrongdoer such amount of freight as can be proved to have been lost owing to the loss of cargo through the collision.* [*The Okehampton*, (1913) Prob. 173.]" (Italics are ours.)

Roscoe on Damages in Marine Collisions, 2nd Ed., pp. 41-42.

See also the remarks of Scrutton, L. J., in *Elliott Steam Tug Co. v. The Shipping Controller*, (1922) 1 K. B. at pp. 139-140.

The case of *The Binghampton* (reported only in C. C. A., 271 Fed. 69), which was decided by Judge Mayer in District Court, and was referred to by the Circuit Court of Appeals in the present case, was so modified on the merits by the Circuit Court of Appeals that the point being considered here was not involved.

Hines v. *Sangstad S. S. Co.* (C. C. A. 1st), 266 Fed. 502, was a case in which a joint libel had been filed by the owner and the charterer. The vessel had been on hire during the period of detention, and the damages for loss of use were apportioned between the charterer and the owner. There was no discussion of the point here involved.

The Aquitania (D. C. S. D. N. Y.), 270 Fed. 239, is apparently the only case, except the instant one, in which the present point has been considered. Judge Mayer held in that case that the charterer had a property interest in the vessel, a conclusion that is, of course, not supportable, and that has been rejected by the Circuit Court of Appeals below.

All of the cases above referred to were decided before this Court rendered its decision in the case of *Osaka Shosen Kaisha* v. *Lumber Co.*, 260 U. S. 490. Before that decision was rendered it had been assumed by some of the lower courts that a charterer, under a charterparty in the form of the present one, had something in the nature of a proprietary interest in the chartered vessel as security for the performance of a charterparty actually entered upon. As an illustration, the Circuit Court of Appeals entertained without comment on the point a suit in rem by the present charterers against this vessel to recover damages for the shipowners' alleged failure to keep the vessel in repair (*The Bjornefjord*, 271 Fed. 682).

POINT V.

The injury to the ship occurred while the vessel lay in a graving dock, and a suit to recover damages for that injury is outside admiralty jurisdiction.

There is no evidence in the record that this vessel was within the jurisdiction of admiralty when she was injured. The libel alleges a cause of action in contract (R 2), and that the premises of the libel are within the admiralty and maritime jurisdiction of the United States (R 3). The answer admits the admiralty and maritime jurisdiction (R 4); that is, it is admitted that admiralty has jurisdiction of the suit upon the repair contract alleged in the libel. Even a specific admission of jurisdiction in tort would not, of course, have the effect of giving the court jurisdiction if the cause of action arose on land.

It is admitted, however, that the vessel was injured while in a graving dock, which was correctly described in the opinion of the District Judge as a "structure permanently resting on the shore, made by dredging and the building of a cofferdam, after the ship is floated into the dock the gates are closed and the water pumped out" (R 23). (See Century Dictionary, Vol. 3, under "Dock".)

The Circuit Court of Appeals dealt with the question of its jurisdiction in tort as follows:

> "As to a liability in tort, we are met at the threshold with an objection to the jurisdiction of a court of admiralty, based on the contention that the tort, if any, having been committed while the ship was in drydock, was not 'committed and effective on navigable waters' (*Gonsalves v. Morse Dry-dock & Repair Co.*, 266 U. S. 171, 172). We feel ourselves however, concluded as to this contention by *The Jefferson*, 215 U. S. 130, and *The Robert W. Parsons*, 191 U. S. 17" (R 69).

It is submitted that in the case of *Great Lakes Dredge & Dock Company* v. *Kierepewski*, 261 U. S. 479, 480, and in *Gonsalves* v. *Morse Drydock & Repair Co.*, 266 U. S. 171, 172, this Court has made quite clear that at no time has this Court intended to authorize a departure from the old and familiar doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction, and that in tort matters it depends upon the locality where the tort is committed; that is to say, if the tort has been consummated on navigable waters, the Court has jurisdiction, otherwise not.

The Jefferson, *supra*, decided merely that a ship may none the less be the subject of a salvage service when she is on drydock and in danger of being destroyed by fire originating on land. It is evident that the Court considered salvage as growing out of, or analagous to, implied contract, and therefore considered that it was immaterial that the vessel was on land at the time; the jurisdiction of the Court in matters of contract and salvage being not dependent upon locality, but merely upon the maritime character of the transaction.

The Robert W. Parsons, *supra*, decided only that an admiralty court has jurisdiction of a contract for the repair of a vessel, no matter where the ship may lie when the repairs are made. It is submitted that the language used by this Court in that case is not applicable to a case of tort and that the later cases of this Court above referred to indicate that this Court has at no time held that a tort committed upon a vessel while resting in an innavigable drydock is within the admiralty jurisdiction.

Hughes on Admiralty, 2nd Ed., p. 196, note 5.

Conclusion.

It is submitted that the libelants below have established no cause of action against the petitioner, and that the decrees below should be reversed and the cause remanded, with directions to dismiss the libel.

Respectfully,

JAMES K. SYMMERS,
JOHN C. CRAWLEY,
for the Petitioner.